YAP HENG CHEONG

v.

CITIBANK BHD

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[BANKRUPTCY NO: 29-334-96]
9 SEPTEMBER 1999

BANKRUPTCY: *Notice - Service - Extension of time - Whether notice may be extended for more than three months - Bankruptcy Rules 1969, r. 96 - Bankruptcy Act 1967, s. 93(4)*

BANKRUPTCY: *Notice - Substituted service - Whether necessary - Practice Note 1 of 1968 - Whether compliance necessary - Whereabouts of judgment debtor unknown*

The judgment creditor filed a bankruptcy notice against the judgment debtor in 1996. Numerous attempts were made by the judgment creditor to serve the bankruptcy notice on the judgment debtor but failed, since the judgment debtor had moved from the addresses used for service. Before the expiry of the bankruptcy notice, the judgment creditor applied for an order to serve the bankruptcy notice *vide* substituted service and for an order for its extension. The SAR granted the orders accordingly. The judgment debtor filed an application to set aside the orders but it was dismissed by the SAR. The judgment debtor appealed.

Held:

[1] The source of power to extend time lies in the primary legislation, *ie*, s. 93(4) Bankruptcy Act 1967 itself which, as has been earlier held, provides for a wide discretion on the court to extend time.

[2] The Bankruptcy Rules 1969 do not provide for the period of validity of a bankruptcy notice.

[3] Rule 96 Bankruptcy Rules 1969 should be interpreted to mean that service of a bankruptcy notice should be effected within three months on the first occasion from its issue. There is nothing in r. 96 Bankruptcy Rules 1969 parallel to O. 6 r. 7(2) Rules of the High Court 1980 to justify the latter being used as an analogy in interpreting the former.

[4] Practice Note 1 of 1968 has no application in cases where the whereabouts of the person to be served is unknown and thus need not be adhered to herein.

[Judgment debtor's appeal dismissed.]

Case(s) referred to:
Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 ***(refd)***
Deverall v. Grant Advertising [1955] CA 111 ***(refd)***
Karen Ahmad Aliyuddin v. Standard Chartered Bank (71) Md 2 ***(foll)***
Mui Bank Bhd v. Raju [1991] 3 MLJ 398 ***(foll)***
Nirmala Muthiah Selvarajah v. NST Press (M) Sdn Bhd [1987] 1 CLJ 413 ***(foll)***
Re Aris Massod, ex p UOL Factoring Sdn Bhd [1998] 4 CLJ Supp 446 ***(refd)***
Re Dato' Othman Bokhari, ex p Diners Club (M) Sdn Bhd [1998] 4 CLJ Supp 315 ***(refd)***
Rohani Noor v. Sincere Leasing Sdn Bhd [1993] 1 AMR 6 225 ***(refd)***
Wee Chow Yong v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 93(4)
Bankruptcy Rules 1969, rr. 96, 275, 276
Rules of the High Court 1980, O. 6 r. 7(1), (2)

Other source(s) referred to:
Mallal's Supreme Court Practice, 2nd edn, p 62
Practice Note 1 1968

For the appellant - Roshan Kumar; M/s Ng Yook Woon, Andrew TC Saw & Co
For the respondent - Andrew Suresh; M/s Paul Chong & Kraal

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Embong J:

This was an appeal in chambers by the judgment debtor (JD) against the decision of the learned SAR, extending the bankruptcy notice (BN) by nine months and allowing its service be effected by way of substituted service.

The BN was filed by the judgment creditor (JC) on 16 May 1996. On 15 June 1996 attempts to personally serve the BN on the JD at both his addresses were made, but failed. On 6 July 1996, by way of a letter of appointment dated 25 June 1996, a further attempt on service was made, but also failed. On both occasions the postal department noted that the JC had shifted address. Before the expiry of the BN on 16 August 1996 the JC applied for its extension. The BN was extended for nine months with an added order that it be served by way of substituted service (S.S). The JD's application to set aside the extension and SS order was refused by the learned SAR on 11 November 1998. From that order the JD appealed. On 4 August 1999 after considering the written submissions of both parties, I dismissed the appeal with costs. The two issues raised before me are now discussed.

i) Whether A BN May Be Extended For A Period Longer Than Three Months?

Learned counsel for the JD while conceding that the BN may be continually extended, submitted that the court is not empowered to extend it to longer than three months, each time. Counsel made a comparison between r. 96 Bankruptcy Rules 1969 (BR) which requires a BN to be served within three months from its issue, with O. 6 r. 7 Rules of High Court (RHC) which speaks of extending the period of validity of a writ of summons by no longer than 12 months at any one time. Since the original validity period of a writ is 12 months, he submitted that, by analogy, a BN too could not be extended beyond its original statutory period of three months. Otherwise, it would mean that there is no limit to the duration of the BN. The wide powers conferred upon the court to extend time, could not mean that it has unlimited jurisdiction to extend time, beyond the original statutory period of three months. Learned counsel relied on *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 MLJ 191, where the Court of Appeal ruled that it was lawful to extend an expired writ by allowing eight separate applications made simultaneously, each for a 12-month extension, thus reviving a writ which had expired for eight years. Although the writ was revived restrospectively extending for eight years, each distinct extension order was limited to 12 months and thus was in compliance with the statutory time frame under the RHC order. It was also submitted that when r. 96 BR was amended in 1985 to enlarge the period for service of the BN from one to three months, the legislature had intended that the time for service be limited to three months and no more, and as such any extension should be also limited to three months.

In *Mui Bank Bhd v. Raju* [1991] 3 MLJ 398, an authority cited by learned counsel for the JC, it was held that the objection that an extension may not be granted for more than three months cannot be accepted because r. 96 did not fix the time period for which a BN may be extended. Siti Norma Yaakob J said this:

> Kaedah 96 hanya menentukan masa notis kebankrapan hendak diserahkan kepada penghutang iaitu dalam tempoh tiga bulan dari tarikh notis berkenaan dikeluarkan. Kaedah ini tidak pula menetapkan tempoh masa notis berkenaan boleh dilanjutkan. Oleh yang demikian, bantahan penghutang bahawa notis kebankrapan tidak boleh dilanjutkan lebih daripada tiga bulan seperti dinyatakan oleh k. 96 juga tidak boleh diterima.

Her ladyship also adverted to the discretionary power of the court to extend time as contained in s. 93(4) Bankruptcy Act 1967 (the Act) which states:

93. Discretionary powers of the court

(4) Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as to the court seems fit.

The power to extend time derived under this primary legislation, it seems to me, is unconstrained, not even when the time is limited by any rules. As such, if there arises any conflict in the exercise of this discretion under s. 93(4) of the Act, with any of its rules, this power will, in my view, and following the decision in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ 176; [1989] 3 MLJ 509, override any time constraint under the rules. In that case, Edgar Joseph Jr J had the occasion to discuss an apparent conflict between s. 3(1)(i) of the Act and r. 276 of the BR and held that "... if there was any conflict between those two measures the court would regard s. 3(1)(i) as having overriding effect since it ranked as principal legislation and the Bankruptcy Rules 1969 are subsidiary legislation".

The words "... upon such terms, if any, as the court seems fit" are, seemingly, wide enough to include also the period of extension which the court may allow in the exercise of its discretionary power thereunder. I also wholeheartedly agree with the position taken by the learned judge in *Mui Bank Bhd v. Raju* (above) as regards the legislature's intended silence on the time limit in r. 96, and would now hold that if Parliament had so intended that there be a maximum time limit for serving the BN, it would certainly had so expressed under that rule. In the absence of such an affirmative constraint, the court can turn to s. 93(4) of the Act and allow for a time extension as it seems fit.

The learned SAR had applied the RHC in allowing the nine months extension for service of the BN. She opined that there was a lacuna in the Bankruptcy Rules as regards the time period and applied r. 276 which states:

276. Rules of the High Court applicable in event of lacunae.

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

She then came to the conclusion that O. 6 r. 7(2) RHC is applicable for extending up to 12 months the time for service of the BN. With regret, I cannot agree with that view. In my considered opinion, there is no such lacuna. Rule 96 itself provides the solution when faced with an application to extend time. It says:

96. Duration of notice

Subject to the power of the court to extend the time, a bankruptcy notice to be served shall be served within three months from the issue thereof.

The qualifying phrase "subject to the power of court to extend time," in itself is a reference to the Court's power to extend time. The source of this power lies in the primary legislation *ie*, s. 93(4) of the Act itself which, as has been earlier held, provides for a wide discretion on the court to extend time. Rule 96 BR should, in my view, be interpreted to mean that service of the BN should be effected within three months on the first occasion from its issue. In *re Aris bin Massod ex parte UOL Factoring Sdn Bhd* [1998] 4 CLJ Supp 176; [1999] 3 MLJ 358, it was held that r. 96 BR does not provide for the extension of the BN itself and that the courts may deal with an application for such an extension by exercising their discretionary powers under s. 93(4) of the Act. There are a number of reported cases where the period of service of the BN had been extended beyond three months. Although not an issue in those cases, there has not been any decision where the courts have held those extensions to be invalid or *ultra vires* r. 96. Thus, in *Rohani @ Hamidah bt Noor v. Sincere Leasing Sdn Bhd* [1993] 1 AMR 6 225, a one year extension was granted. Other examples of cases where extensions of more than three months were granted, although not in issue but nevertheless not declared to be invalid can be found in *Re Dato' Othman Bokhari ex parte Diners Club (M) Sdn Bhd* [1998] 4 CLJ Supp 315 (12 months extension granted) and *Mui Bank v. Raju* (12 months extension).

Learned counsel for the JC had also urged this court to apply O. 6 r. 7(1) RHC, by way of an analogy to r. 96 BR and not allow any extension greater than the original three months. In other words, a restrictive interpretation should be given to r. 96 BR. This argument also could not stand. Order 6 r. 7 RHC specifically provides that a writ of summons shall be valid for only 12 months and that this validity period may be extended by the court for any one time, not exceeding 12 months (see O. 6 r. 7(2)). The BR does not provide for the period of validity of a BN. Its r. 96 speaks only of the time limited for its service. There is nothing in r. 96 parallel to O. 6 r. 7 of the RHC to justify the latter to be used as an analogy in interpreting the former.

Lastly, on the facts of this case, I find that the learned SAR, had every justification in exercising her discretion to extend the time for service of the BN by a further nine months although on a premiss, as explained earlier, from which I differed. She had also found that it was necessary for service of the BN to be effected by way of substituted service, and as such had justifiably acted under r. 275 BR to grant the said extension. Rule 275 BR states:

275. Abridging or enlargement of time

The court may under special circumstances and for good cause shown extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceedings.

In *re Rohani @ Hamidah bt Noor* (cited earlier), Shanker J, held that "there was good cause to extend time to serve the Bankruptcy Notice when it could not be served personally and the order for substituted service was an absolute necessity." Similarly, in the instant case, such good cause was shown to the satisfaction of the court, to justify an extension, and for the reasons discussed below, to allow the SS order.

ii) Was The Order For Substituted Service Necessary?

From the affidavit deposed by the employee of the JC, it is evident that that he had made two calls on the JD's address on 15 June 1996, for the purpose of effecting service of the BN. On both occasions he had been informed, first by a worker thereat that there was no such person in the name of the JD residing there, and on the second occasion, by a tenant, that the JD had moved out. On 25 June 1996, the JC, through its solicitor caused an AR registered letter of appointment to be sent to the JD, appointing 6 July 1996 as the call date. The AR card was returned by the postal department with the annotation word 'left' written on the envelope. Despite that a call was nonetheless made on the appointed date. That, of course proved futile as the JD was no longer residing at the said address. I am satisfied that the JC had fully complied with the requirements laid down in *Practice Note No. 1 of 1968* in its attempt to have the BN served on the JC, although I am of the view that the said Practice Note had no application in the circumstances of the case and need not be adhered to. I find support in so saying from the case of *re Nirmala a/p Muthiah Selvarajah t/a Shamin Properties v. NST Press (M) Sdn Bhd* [1987] 1 CLJ 413; [1988] 2 MLJ, where V.C. George J held that since no specific guideline is provided under *Practice Note 1 of 1968* for cases where the whereabouts of the person to be served was unknown, the said Practice Note thus had no application in respect of an application for substituted service. The learned judge also referred to *Mallal's Supreme Court Practice* 2nd edn. at 62/5/2 which quoted Romer LJ in *Deverall v. Grant Advertising* [1955] CA. 111, who said:

The intention which underlines all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings.

The abovecited case was followed by Kang Hwee Gee J in the case of *Karen Ahmad Aliyuddin v. Standard Chartered Bank* (71) Md 2 where the learned judge, with whom I agree, held that:

> it is not necessary in all cases for Practice Direction No. 1/68 to be completely complied with before the court could consider whether an order for substituted service should be granted. The direction was merely a guideline to assist the court in making a decision as to whether the application was *bona fide* before allowing it.

The JD in the instant case had also failed to comply with his contractual obligation to the JC as a credit card holder pursuant to cl. 33 of the credit card agreement which states:

> The Cardholder must promptly notify the Bank in writing of any changes in employment or business or address (office or residential) or if the Cardholder intends to be absent from Malaysia for more than thirty days.

In the circumstances, I find that the complaints by the JD that the JC had not made proper enquiries as to this whereabouts and that there had been no compliance with *Practice Note 1/1968*, to be groundless and without merit. He had only himself to blame for if the JC found it necessary to have the BN served by way of substituted service. The learned SAR's order granting the JC's application for substituted service is therefore confirmed.

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